VET.APP. No. 15-3624

IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

THOMAS E. WALKER,
Appellant,

v.

ROBERT A. McDONALD,
Secretary of Veterans Affairs,
Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF OF APPELLEE SECRETARY OF VETERANS AFFAIRS

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I. ISSUE PRESENTED

Whether the Court should affirm the Board of Veterans' Appeals (Board) decision of August 4, 2015, which denied Appellant's claim of entitlement to a rating greater than 10 percent for tinnitus on an extra-schedular basis.

II. STATEMENT OF THE CASE

A. Jurisdictional Statement

The United States Court of Appeals for Veterans Claims (Court) has jurisdiction over the instant appeal pursuant to 38 U.S.C. § 7252(a).

B. Nature of the Case

Appellant, Thomas E. Walker, appeals an August 4, 2015, decision of the Board that denied his claim of entitlement to a rating greater than 10 percent for tinnitus on an extra-schedular basis.[1] (Record Before the Agency (R.) 1-10). On appeal, Appellant asserts that the Board (1) misinterpreted the law as it pertained to 38 C.F.R. § 3.321, and (2) failed to address this Court's holding in *Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014). (Appellant's Brief (App. Br.) at 12-24). As to be explained below, Appellant has not carried his burden of persuasion. Thus, the Court should affirm the Board's decision.

C. Statement of Facts

Appellant, who had active military service from December 1967 to September 1973 (R. at 1638),[2] was originally granted service connection for tinnitus in November 1991, and was assigned a rating of 10 percent, effective April 27, 1981. (R. at 1504-06, 1510-11 (November 13, 1991, cover letter for November 7, 1991 rating decision, respectively)). The record reflects that Appellant presented to a VA audio examination in September 2005, wherein it was reported that Appellant had "constant tinnitus in the right ear that sounds like a buzz." (R. at 1350 (1349-51)). In February 2007, however, Appellant submitted a claim to increase his rating. (R. at 1279-81). Two months later, he

[1] The Board remanded the issue of entitlement to an initial rating in greater than 30 percent for post-traumatic stress disorder, thus placing that matter beyond the Court's jurisdiction. *Kirkpatrick v. Nicholson*, 417 F.3d 1361 (Fed. Cir. 2005).
[2] As Appellant aptly notes (App. Br. at 1, n.1), his DD 214 is not in the file, but his dates of service are not presently at issue.

presented to a VA audio examination, and the medical report reflects that Appellant's tinnitus was "bilateral" and "constant." (R. at 1231 (1230-31)).

Appellant's claim for an increase was denied in August 2007 (R. at 1194-1200), and he submitted a notice of disagreement (NOD) in December 2007. (R. at 1191-93). Based on receipt of a statement of the case (SOC) issued in June 2008 (R. at 1134-49), Appellant submitted a substantive appeal in October 2008. (R. at 1097-1100). Appellant also presented to another VA audio examination in November 2008, wherein "[h]e reported constant tinnitus bilaterally that sounds like crickets." (R. at 1091 (1090-93)). A supplemental SOC (SSOC) issued in December 2008. (R. at 1082-89). Appellant's claim was certified to the Board in May 2011 (R. at 439), and, in January 2012, the Board denied his claim. (R. at 421-32). Appellant appealed the Board's decision, and, based on a joint motion for partial remand, the Court remanded the issue of entitlement to a disability rating higher than 10 percent for tinnitus, to include on an extra-schedular basis. (R. at 390-94).

On August 4, 2015, the Board rendered a final decision, which Appellant appealed to this Court. (R. at 1-10).

III. SUMMARY OF THE ARGUMENT

The Court should affirm the Board's decision, as Appellant has failed to carry his burden of persuasion and demonstrate that that Board misinterpreted 38 C.F.R. § 3.321. Additionally, affirmance of the Board's decision is appropriate where the Board has plausibly, if not correctly, determined – even if the

determination was implicit – that a discussion of a collective impact discussion was not warranted, because a review of the record reveals that the question was neither expressly nor reasonably raised.

IV. ARGUMENT

1. Applicable Criteria

The award of an extra-schedular disability rating is the result of a three-step inquiry. *Thun v. Peake*, 22 Vet.App. 111, 115 (2008). The first step is to compare the level of severity and symptomatology of the appellant's disability with the established criteria in the rating schedule. *Id.* If these criteria "reasonably describe the claimant's disability level and symptomatology," the regular schedular rating system is adequate, and extra-schedular referral is not warranted. *Id.* If the rating schedule does not adequately describe the claimant's symptomatology and level of disability, then "the RO or Board must determine whether the claimant's exceptional disability picture exhibits other related factors," such as "marked interference with employment" or "frequent periods of hospitalization." 38 C.F.R. § 3.321(b)(1). If this second condition is met, then the case must be referred to the Under Secretary for Benefits or the Director of the Compensation Service to determine whether to assign an extra-schedular disability rating in order to "accord justice." *Thun*, 22 Vet.App. at 116; 38 C.F.R. § 3.321(b)(1). Furthermore, "the Board is required to address whether referral for extra-schedular consideration is warranted for a veteran's disabilities on a collective basis . . . when that issue is argued by the claimant or reasonably raised by

the record through evidence of the collective impact of the claimant's service-connected disabilities." *Yancy v. McDonald*, 27 Vet.App. 484, 495 (2016).

2. Appellant has failed to carry his burden of persuasion and demonstrate that the Board committed remandable error in its determination that extra-schedular referral is not warranted.

Before the Court, Appellant contends that the Board misinterpreted 38 C.F.R. § 3.321 and *Thun*, 22 Vet.App. at 116. Specifically, Appellant's argument pertains only to whether Appellant was entitled to referral of his claim for extra-schedular consideration. The Board noted such in its decision, and Appellant has not disputed such. *See* (R. at 3 (1-10)). The Court has stated that issues not addressed by Appellant in his brief are considered waived. *See Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999) ("[C]ourts have consistently concluded that the failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument.").

In line with the aforementioned, Appellant argues that the Board erred by providing a "blanket statement[] that tinnitus of ***any severity*** is contemplated by the rating criteria." App. Br. at 7 (emphasis added). Not so. The Court should find this argument unavailing where Appellant's interpretation of the Board's finding is simply incorrect. Appellant is focusing upon only one sentence within the Board's decision, but, like a painting with various colors, looking at the individual color does not provide the complete picture. The Court has consistently held that the Board's decision must be read as a whole. *See*

Janssen v. Principi, 15 Vet.App. 370, 379 (2001) (per curiam) (explaining that Board decisions must be read as a whole).

True, the Board in one sentence stated "it considers all noise in the ears regardless of description (crickets, etc.), volume, or severity" (R. at 7 (1-10)), but this is only part of the Board's decision.. In looking at the entirety of its decision, the Board stated that, based on the factual evidence presented as it specifically pertains to *Appellant's* tinnitus symptomatology –" 'extremely loud,' constant, and sounded like crickets" – of which there is no dispute, his symptomatology has been contemplated by the schedule of rating disabilities, not that in all situations no matter the severity, any such symptomatology would be contemplated. The Board stated:

> As set forth, the rating schedule addresses recurrent tinnitus whether it be in one ear, both ears, or the head. "Tinnitus is defined as '***a noise in the ears such as ringing, buzzing, roaring, or clicking.***'" *Smith v. Principi*, 17 Vet.App. 168, 170 (2003) (quoting *Dorland's Illustrated Medical Dictionary* 1714 (28th ed. 1994)).
>
> Considering the definition of tinnitus, as well as the notes following the diagnostic code, the Board finds that the rating criteria contemplate the referenced symptomatology. That is, [they] consider[] all noise in the ears regardless of description (crickets, etc.), volume, or severity. *The Veteran simply has not identified symptoms that do not fall within the rating criteria.*

(R. at 7 (1-10) (emphasis added)). Indeed, Appellant's interpretation of the Board's determination "that a veteran's tinnitus disability can never be of greater severity than what is contemplated by the 10[-]percent rating criteria," App. Br. at 8, cannot be sustained where Appellant does not consider the last sentence of

the aforementioned decision, where the Board specifically noted, "The Veteran simply has not identified symptoms that do not fall within the rating criteria." App. Br. at 8. This sentence does not lead one to believe that any tinnitus disability, regardless of severity, is contemplated by the schedule of rating disabilities. Rather, the sentence explains that, based only on Appellant's symptoms in this case, they are contemplated by the schedule.

Appellant further asserts that the plain meaning of the regulation refers to only non-constant duration of tinnitus symptoms, and Appellant's symptoms are not non-constant, as is the only duration contemplated by the schedule for rating tinnitus. App. Br. at 8. This also is not so. Upon review of the Board's decision, its conclusion that Appellant's sound of crickets and the level of the sound is plausibly based in the record where it explains that it arrived at its decision based on two different sources, the notes following the rating criteria for tinnitus and the definition of tinnitus, which states that tinnitus is "a noise in the ears *such as* ringing, buzzing, roaring, or clicking." (R. at 8 (1-10) (emphasis added)); *see* App. Br. at 8. Notably, "such as" indicates reference to an example or examples and does not limit the regulation to what type of noise. *Mauerhan v. Principi*, 16 Vet.App. 436, 442 (2002) (noting that "such as" means "for example" or "like or similar to," and that use of the term "such as" in a regulation indicates that the terms following that phrase serve as examples for what is encompassed by the regulation). Based on the definition, tinnitus is not limited to ringing, buzzing,

roaring, or clicking, and here the Board appropriately determined that it is crickets.

In further explanation of the noise, various definitions of tinnitus, like defined in *Dorland's*, which was cited by the Board (R. at 7 (1-10)), define tinnitus as some manifestation of noise. *See, e.g.,* Webster's Medical Desk Dictionary 720 (1986) (defining tinnitus as "a sensation of noise (as a ringing or roaring) that is caused by a bodily condition . . . and can [usually] be heard only by the one affected"); *Tinnitus, Definition*, Mayo Clinic, http://www.mayoclinic.org/diseases-conditions/tinnitus/home/ovc-20180349 (last visited August 25, 2016) (defining tinnitus as "noise or ringing in the ears"). "Noise" is defined as a "sound, especially of a loud, harsh, or confused kind: deafening noises." http://www.dictionary.com (last visited Aug 25, 2016). Essentially, as explained by the Board, the level of noise is contemplated by the schedule for rating disabilities where the definition of noise which is included within the definition of tinnitus includes the level of the noise. Given such, the Board's determination is plausible.

Next, Appellant asserts that the Board's statement of reasons and bases is inadequate because the Board's finding that his tinnitus did not render him unemployable is a separate and distinct legal question. App. Br. at 9. The Court should not be persuaded by this argument because, even assuming arguendo that the Board utilized the incorrect standard as to the second step of *Thun*, it was harmless because, in order to have Appellant's claim referred for extra-

schedular consideration, step one must also be answered in the affirmative. *Yancy*, 27 Vet. App. at 494–95 ("If either element is not met, then referral for extraschedular consideration is not appropriate."). That quite simply is not the case here. Rather, as explained above, the Board's determination that the first step of *Thun* was not satisfied is plausible. Given such, Appellant would not have had his case referred.

3. Appellant has not demonstrated that the issue of a collective impact of his disabilities was reasonably raised by the record sufficient to require referral for extra-schedular consideration.

Appellant asserts, by relying upon U.S. Court of Appeals for the Federal Circuit's decision in *Johnson v. McDonald* that, in discussing whether Appellant was entitled to extra-schedular consideration, the Board erred by not discussing the aggregate symptomatology of his conditions, even though it was reasonably raised by the record. App. Br. at 10; 762 F.3d 1362 (Fed. Cir. 2014). In making an extra-schedular-referral determination, the Board must consider the collective impact of multiple service-connected disabilities whenever that issue is expressly raised by the claimant or reasonably raised by evidence of record. *Yancy*, 27 Vet.App. at 495 (citing *Johnson v. McDonald*, 762 F.3d at 1365, and *Robinson v. Peake*, 21 Vet.App. 545, 552 (2008), *aff'd sub nom. Robinson v. Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009)). In this instance, the Court should find Appellant's argument unavailing where he has failed to carry his burden of demonstrating error. *See Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (holding that

the appellant bears the burden of demonstrating error on appeal).

Here, Appellant has not argued that he expressly raised the collective impact of his disabilities, only that the issue was reasonably raised by the record and that the Board should have discussed such. Appellant, however, has not demonstrated that it was reasonably raised by the record. Instead, Appellant refers only to his service-connected disabilities in his brief, which include "obstructive sleep apnea, PTSD, right chin and mandible sensory neuropathy, several disfiguring scars, a retained body in his cervical spine, bilateral hearing loss, and lost teeth" (App. Br. at 11-13), and he fails to make the essential connection between the disabilities to actually raise such an issue.

Indeed, "merely saying something is so does not make it so." *See Stolt-Nielson S.A. v. Animal Feeds International Corp*., 559 U.S. 662, 675 n7 (2010). In *Yancy*, the Court determined that the collective impact of the appellant's service-connected disabilities was reasonably raised where Appellant in his substantive appeal informed VA how his disability was affected by his other service-connected disabilities. *See Yancy*, 27 Vet.App. at 496. Here, Appellant has only pointed to his symptomatology and has failed to connect how his service-connected tinnitus is impacted by his other service-connected disabilities. For instance, Appellant states that his bilateral hearing loss was impacted by a noisy situation and the Veteran's tinnitus created a cricket like buzzing. App. Br. at 11. Appellant provides no further analysis. He states that he had difficulty at hearing at work and that his PTSD caused him to be unemployable. App. Br. at

12. Once again, there is no further analysis on how there is a connection between Appellant's PTSD and tinnitus. Without more explanation, he has failed to support his contention with any meaningful analysis, and the Court should reject it as an undeveloped argument. *Locklear v. Nicholson*, 20 Vet.App. 410, 416-417 (2006) (requiring that an appellant plead with some particularity the allegation of error so that the Court is able to review and assess the validity of the appellant's arguments). Thus, the Court should affirm the Board's decision.

V. CONCLUSION

In view of the foregoing, the Secretary respectfully requests that the Court affirm the Board's August 2015 Board decision.

Respectfully submitted,

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